

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

FILLED BY *ag* D.C.  
05 MAY 20 PM 4:06

JERRY L. BILLINGSLEY,

)

Plaintiff,

)

vs.

)

No. 02-2920 BV

SHELBY COUNTY, DEPUTY JAILER

)

JOHN FORD, and MPD OFFICER JON

)

KIRKLAND,

)

Defendants.

)

ROBERT R. MELCHIO  
CLERK, U.S. DIST. CT.  
W.D. OF TN, MEMPHIS

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ORDER ON MOTION OF DEFENDANTS TO CLARIFY CASE AS NONJURY (No. 105)

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Before the court is the December 21, 2004 motion of the defendants seeking a clarification from the court as to whether the trial of this case will be a jury trial or non-jury trial. In support of their motion, the defendants point out that none of the parties ever requested a jury in writing nor is there any agreement among the parties to try this case to a jury. The motion was referred to the United States Magistrate Judge for determination. A hearing was held on Friday, May 20, 2005. Present at the hearing were Jerry Billingsley, proceeding pro se, Deadrick Brittenum, attorney for Officer Ford and Shelby County, and Deborah Godwin and Elizabeth McKinney, attorneys for Officer Kirkland. For the reasons stated at the hearing on the record and for the following reasons, the court finds that there was no request for a jury as

required by Rule 38 of the Federal Rules of Civil Procedure, and the case should be set for trial before the court without a jury.

Rule 38(b) states that "[a]ny party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by 5(d)." Neither party has made a demand for a jury in writing. Rule 38(d) states that "[f]ailure to serve and file a demand as required by this rule constitutes a waiver by the party.

The complaint filed by Billingsley does not contain a request for a jury trial. None of the defendants requested a jury in their answers. Billingsley contends that the parties agreed to a jury trial at the April 8, 2003 scheduling conference before Judge McCalla. The scheduling order does not reflect this assertion. Rather, it states that the case is "SET FOR TRIAL." Furthermore, it would have been impossible for Officer Jon Kirkland to enter into an agreement at that time because he had not been served, he was not present nor was any counsel present on his behalf. In addition, the case docket states that a jury has NOT been demanded.

The defendants, in their joint motion for clarification, believe that the confusion arose because at some point the court began referring to this case as a jury trial. See Docket No. 68,

Amended Scheduling Order, signed by Judge Breen and Docket No. 101,  
Amended Scheduling Order, also signed by Judge Breen, as well as  
Docket No. 104, Notice of Re-Setting of the trial date.

Accordingly, this case shall be docketed as non-jury and tried  
to the court without a jury.

IT IS SO ORDERED this 20th day of May, 2005.

  
Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE



# Notice of Distribution

This notice confirms a copy of the document docketed as number 179 in case 2:02-CV-02920 was distributed by fax, mail, or direct printing on May 23, 2005 to the parties listed.

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Honorable J. Breen  
US DISTRICT COURT